NO. 83-1204

IN THE

Supreme Court of the United States

October Term, 1983

SUSAN LEE CULTEE, DEBORAH CULTEE, KAREN BEATTY CULTEE, and BRENDA LEE CULTEE,
Petitioners,

v.

UNITED STATES OF AMERICA
WILLIAM P. CLARK,
Secretary of Interior,

INTERIOR BOARD OF INDIAN APPEALS

and HELENE JAKE,

Respondents.

HELENE JAKE'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Mrs. Helene Jake, the sole heir under the terms of the will of William Mason Cultee, and one of the respondents herein, respectfully prays that the Court deny the Petition for a Writ of Certiorari sought for the purpose of reviewing the Judgment and Opinion of the United States

Court of Appeals for the Ninth Circuit entered on August 26, 1983, and the subsequent Order Denying Rehearing entered on October 20, 1983.

STATEMENT OF THE CASE

William Mason Cultee, an enrolled member of the Quinault Indian Tribe, died on August 4, 1976, leaving a will dated August 14, 1983, which named as his sole heir his first cousin, Mrs. Helene Jake, also an enrolled member of the Quinault Indian Tribe and with whose family he had resided during the final years of his life. Mr. Cultee's will had been prepared for him and formally witnessed by employees of the Bureau of Indian Affairs in Everett, Washington.(1)(2) Mr. Cultee's will was prepared on the standard government will form #5-5407. At the same time Mr. Cultee

(1) The complete content of the Last Will and Testament of William Mason Cultee is attached as Appendix A.
(2) The complete content of the Affidavit to Accompany Indian Will is attached as Appendix B.

executed his will, another employee of the Bureau of Indian Affairs prepared and signed a supplemental Affidavit form #5-5408 in which that employee swore that he had prepared the will as requested by Mr. Cultee.(3)

After the will was executed, it was sent to the Office of the Regional Solicitor of the Department of Interior by the Superintendent of the Western Washington Agency of the Bureau of Indian Affairs. The Superintendent stated on the transmittal document that the heir, Mrs. Helene Jake, the respondent herein, was eligible to take under Mr. Cultee's will. The Regional Solicitor certified on August 23, 1973, to the Superintendent that Mr. Cultee's will was satisfactory as to form.

After Mr. Cultee's death the four petitioners in this case first claimed that they were the illegitimate children of Mr.

(3) The complete text of supplemental Affidavit is attached as Appendix C.

Cultee and one Shirley Beatty Modlin, a woman with whom Mr. Cultee had lived in 1953 and occasionally thereafter until 1960. Mr. Cultee did not marry Ms. Modlin either under the laws of the State of Washington or by Indian custom marriage. Mr. Cultee had been legally married at one time during his life and one legitimate child was born of that marriage, but died on July 8, 1965. During at least the last 15 years of Mr. Cultee's life he consistently maintained that he had no children other than his deceased child.

The four petitioners herein contested the validity of Mr. Cultee's will and two full days of hearing were held by the Administrative Law Judge of the Office of Hearing Appeals of the United States Department of the Interior on April 5, 1978, and again on March 29, 1979. The petitioners attacked the will's validity on essentially three grounds:

1. That Mr. Cultee lacked testamentary capacity on the day he made his will both

because he had a history of alcoholism and was suffering from an insane delusion evidenced by his stating in his will that he had no children;

2. That Mrs. Helene Jake as the sole beneficiary under the will exerted undue influence on Mr. Cultee; and

3. That the will failed to comply with one guideline contained in the Bureau of Indian Affairs pamphlet entitled "Instructions to Field Officers," a pamphlet which was designed to help field personnel prepare Indian wills and which advised the manner in which to disinherit one's children.

The Administrative Law Judge rejected each of the petitioners' grounds and on February 21, 1980, entered a Final Order finding that Mr. Cultee's will was validly executed and that Mrs. Helene Jake was the sole heir under the terms of the will. The Administrative Law Judge also found that Mr. Cultee possessed testamentary

capacity to execute a will and that Mr. Cultee was not subject to the undue influence of Mrs. Jake. The Administrative Law Judge held that by a preponderance of evidence the four petitioners were the illegitimate children of Mr. Cultee even though Mr. Cultee had insisted he had no children. The Administrative Law Judge found that the decedent knew what he was doing when he stated he had no children and that his belief was a "result of conscious and deliberate planning" and that Mr. Cultee was certainly not insane for holding this belief. (Final Order, pg. B-42 of Petition for Writ of Certiorari herein filed). Finally, the Administrative Law Judge found that no departmental regulation had been violated in the drafting of the will.

Although the Administrative Law Judge found the will to be valid he ruled that a certain small percentage of the real estate involved could only be distributed

to Mr. Cultee's heirs at law, the four petitioners herein, and that Mrs. Jake was therefore ineligible to take this portion of the estate. On May 1, 1980, the Petition for Rehearing filed by the four petitioners was denied by the Administrative Law Judge on the ground that the Petition failed to offer new evidence.

On June 24, 1980, the four petitioners filed a Notice of Appeal to the Interior Board of Indian Appeals and on July 27, 1981, the Interior Board entered a decision affirming the Order of the Administrative Law Judge.

On September 28, 1981, the four petitioners filed suit in federal District Court claiming three grounds for relief: (1) that the Department of Interior's failure to follow its instructions regarding the naming of children in a will was a denial of due process; (2) that the failure to follow that instruction was a violation of 25 U.S.C. 373, and (3) that

the approval of the will was therefore an abuse of discretion, as well as arbitrary and capricious. On October 13, 1981, the petitioners amended their Complaint to include an additional ground for relief specifically that the Department of Interior's failure to promulgate regulations protecting pretermitted or unnamed children was a denial of due process and equal protection.

On July 15, 1982, Mrs. Helene Jake filed a Motion for Summary Judgment and the four petitioners' Memorandum in Opposition to the Motion for Summary Judgment raised for the first time the issue which they now argue on appeal. Specifically, that 25 U.S.C. 464 requires Indian wills comply in all aspects with state law.

On September 14, 1982, the District Court granted Mrs. Jake's Motion for Summary Judgment affirming the validity of Mr. Cultee's will for the reasons that

the evidence supported the finding that the document was technically sufficient and a rational testamentary scheme.

On November 12, 1982, the four petitioners filed an appeal in the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals affirmed the judgment of District Court and held that the Administrative Law Judge had properly applied the concepts of both § 373 and § 464 to his review of the will and that the will as modified complied with the federal statutory scheme governing testamentary disposition of Indian property.

SUMMARY OF ARGUMENT

A writ of certiorari should not issue because petitioners have failed to present sufficiently special and important reasons therefor. The petitioners' sole ground for their request that a writ of certiorari should issue is their perception that a conflict exists between the United States Court of Appeals for the

Ninth Circuit and the Supreme Court ruling in Rice v. Rehner, 103 S. Ct. 3291 (decided July 1, 1983). The petitioners' analysis of Rice is incorrect and totally inappropriate to the issue presented here.

ARGUMENT

Rice deals with the use and distribution of liquor within the State of California. As noted by Justice O'Connor, writing for the Court, the issue in Rice is a narrow one and that case does not present any new or broad principles which would warrant the issuance of a writ of certiorari in this matter.

Historically, there has been a tradition of concurrent state and federal jurisdiction over the use and distribution of liquor by Indian tribes and their members. Id at 3298. An important factor, not present in the area of Indian probate questions, but greatly influencing Court decisions regarding liquor use and distribution is the impact upon non-Indians. The

Court in Rice is explicit in referring to this factor and the substantial role it played in the Court's determination. Id at 3298.

Furthermore, the decision in Rice reaffirms those principles of law which recognize the supremacy of the federal law unless Congress has expressly provided that state laws shall apply. Id at 3295. The mere reference to state law in a federal statute is insufficient to allow a state to assert regulatory power over a facet of Indian life. Id at 3307 (Justice Blackman, dissenting, citing Bryan v. Itasca County, 426 U.S. 373, 48 L. Ed. 710, 96 S. Ct. 2102 (1976)).

Petitioners contend that a portion of 25 U.S.C. 464, to-wit, "In all instances such [restricted Indian] lands . . . shall descend or be devised in accordance with the then existing laws of the state, or federal laws where applicable, in which said lands are located ...," confers state

authority as to the laws of descent and distribution over all Indian probate matters. This contention is erroneous and if adopted would be harmful to the existing federal scheme for Indian probate.

25 U.S.C. 373 governs all those essential matters relative to Indian wills. Nothing in 25 U.S.C. 464 dilutes or removes this power from the federal government. To adopt the petitioners' theory would mean that this Court would have to circumvent the rule cited in Rice at page 3295 against construing legislation to repeal, by implication, an aspect of tribal self-government. There is no reason under this fact situation for the Court to enter such a ruling.

25 U.S.C. 464 was enacted by Congress to prevent the alienation of Indian land outside of Indian ownership. Hydalburg Co-Op Association v. United States, 667 F.2d 64 (1981); See Solicitor's Opinion, 54 I.D. 584 (August 17, 1934). It is

obvious that the intent of Congress has been carried out in this case since respondent Helene Jake is an enrolled member of the Quinault Tribe. There is no showing that Congress ever intended to protect the rights of pretermitted heirs.

Justice Harlan's concurring opinion in Tooahnippah v. Hickel, 397 U.S. 598 (1970) is instructive in reviewing the issues involved herein. It is presumptuous of petitioners to state in their Petition for Certiorari that as learned a student of jurisprudence as Justice Harlan would be unaware of 25 U.S.C. 464 at the time that decision was rendered. It is more likely that he, as well as Chief Justice Burger writing for the Court, was well aware of this section and correctly believed it had no effect upon the operation of 25 U.S.C. 373.

In his opinion, Justice Harlan states that the Secretary of the Interior cannot disapprove an Indian will solely because

the disposition is unfair to someone who would otherwise inherit. Id at 617. Yet the petitioners would ask that this Court do exactly that by using 25 U.S.C. 464. Justice Harlan further points out that Congress "could have only intended to give [the testator] the power to dispose of restricted property according to personal preference rather than the predetermined dictates of intestate succession." Id at 617.

This Congressional intent should not be subverted by an inaccurate and unique reading of 25 U.S.C. 464. The Ninth Circuit's decision is in agreement with the long line of cases decided by this Court, including Rice v. Rehner, supra, and as such the Petition for Writ of Certiorari should be denied.

Finally, mention must be made of the petitioners' attempt to characterize a footnote in Justice Harlan's concurring opinion in Tooahnippah as an invitation to

the Interior Department to promulgate a regulation protecting Indian children from inadvertent disinheritance. It is obvious that Justice Harlan was doing no such thing as suggested by the petitioners. What is important to note is that he obviously believes, § 464 notwithstanding, that it would be necessary for a regulation to be written should the Secretary or Congress even believe such protection to be necessary. It is also very obvious that he believed that it was not the Court's place to rewrite the statutes and regulations dealing with this subject. The respondent, Helene Jake, also believes that it is not this Court's place to undertake the task which Justice Harlan believed it could not do at the time of the Tooahnippah decision.

CONCLUSION

Due to the above reasons, this Court should deny the Petition for a Writ of Certiorari to issue in this case.

RESPECTFULLY SUBMITTED this 17th day of February, 1984.

LAW OFFICES OF MARY ANNE VANCE

By: _____
MARY ANNE VANCE
Attorney for Respondent
Helene Jake

5-5407

INDIAN WILL UNDER THE ACT OF
JUNE 25, 1910 (36 STAT. 855-856)
As Amended By The Act Of
February 14, 1913 (37 Stat. 678)

LAST WILL AND TESTAMENT

OF

WILLIAM MASON CULTEE Allottee No. 1459
Age 11/16/1927

I, William Mason Cultee of the Quinault Tribe, of the State of Washington, being of sound and disposing mind, realizing the uncertainty of human life, do make this my Last Will and Testament hereby revoking all former wills by me made, in manner and form following, that is to say:

FIRST.-I desire that all my legal debts be paid, including the expenses of my last illness, funeral, and burial.

SECOND.-I give, devise, and bequeath to my First Cousin, HELENE MOWITCHMAN BLACK JAKE, Quinault allottee 2031, all of my estate: real, personal or mixed, of whatsoever kind or nature and wheresoever situated, of which I may die seized or ever shall

be possessed.

THIRD.-- To anyone making any claim against my estate - real and/or personal, I leave nothing.

FOURTH.-- I hereby declare that as of the date of this instrument, I am a single person; and that I have no children.

I give, devise, and bequeath all of the rest and residue of my estate, real, personal, and mixed, to: my First Cousin, HELENE MOWITCHMAN BLACK JAKE.

In witness whereof, I, William Mason Cultee, have hereunto set my hand, sealed, published, and declare this to be my Last Will and Testament, this 14th day of August, in the year of our Lord one thousand nine hundred and seventy-three.

/s/ William Mason Cultee (L.S.)
William Mason Cultee

Witnesses:

/s/ L. D. Tadlock
Residing at Hoquiam

/s/ Carl S. Sotomish
Residing at Taholah, Wn

The foregoing instrument of writing was here and now signed by William Mason Cultee in our presence, and at his request and in the presence of each other we have signed as witnesses and he has published and declared this to be his Last Will and Testament.

/s/ L. D. Tadlock
Residing at Hoquiam

/s/ Carl S. Sotomish
Residing at Taholah, Wn.

STATE OF WASHINGTON)
)SS.
COUNTY OF GRAYS HARBOR)

AFFIDAVIT TO ACCOMPANY INDIAN WILL

I, William Mason Cultee, being first duly sworn, on oath, depose and say: That I am an enrolled member of the Quinault Tribe of Indians in the State of Washington; that on the 24th day of July, 1973, I requested Gordon E. Cannon to prepare a will for me; that the attached will was prepared and I requested L. D. Tadlock and Carl S. Sotomish to act as witnesses thereto; that the said witnesses heard me publish and declare the same to be my last will and testament; that I signed said will in the presence of both witnesses and they signed the same as witnesses in my presence and in the presence of each other; and that said will was read and explained to me (or read by me), after being prepared and before I signed it; and it clearly and accurately expresses my wishes; and I further state that no person has influenced me to make

disposition of any part of my property in any other manner than I myself of my own free will desire and wish to dispose of it.

/s/ William Mason Cultee
William Mason Cultee

Allottee No. 1459

We, /s/ L. D. Tadlock and /s/ Carl S. Sotomish, each being first duly sworn, on oath depose and state: That on the 14 day of August, 1973, William Mason Cultee, a member of the Quinault Tribe of Indians of the State of Washington, published and declared the attached instrument to be his last will and testament, signed the same in the presence of both of us and requested both of us to sign the same as witnesses; that we, in compliance with his request, signed the same as witnesses in his presence and in the presence of each other; that said testator was not acting under duress, menace, fraud or undue influence of any person, so far as we could ascertain and in our opinion was mentally capable of disposing of all his estate by

will; and that neither of us is named as a beneficiary in said will or in any wise interested in the distribution of the estate of said testator.

/s/ L. D. Tadlock /s/ Carl S. Sotomish

5-5408

I, Gordon E. Cannon, being first duly sworn, on oath depose and say: That I am employed as Realty Specialist, Real Prop. at Western Washington Indian Agency in the State of Washington; that on the 24th day of July, 1973, William Mason Cultee an enrolled member of the Quinault Tribe of Indians in the State of Washington requested me to prepare his last will and testament; and at his request I typed said will and submitted for his signature.

/s/ Gordon E. Cannon

Subscribed and sworn to before me this 14 day of August, 1973, by William Mason Cultee, L. D. Tadlock and Carl S. Sotomish.

/s/ Jean S. Stymer
NOTARY PUBLIC in and for the State of Washington, residing at Hoquiam.

My commission expires: 2/25/76

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